No. 12941

In the United States Court of Appeals for the Ninth Circuit

FEDERAL POWER COMMISSION, APPELLANT

v.

ARIZONA EDISON COMPANY, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT AND INTRODUCTION

This is an appeal by the Federal Power Commission under Section 128 of the Judicial Code (28 U. S. C. 1291) from a judgment of the United States District Court, District of Arizona, entered April 2, 1951 (R. 89). Notice of the appeal was filed April 23, 1951 (R. 90); the record on appeal was filed in this Court May 19, 1951 (R. 90–93); and the Commission's statement of points was filed June 4, 1951 (R. 94–100).

The judgment appealed from was one dismissing a proceeding on the Commission's Complaint (R. 3–77) brought under Sections 314 (a), 314 (b), and 317 of the Federal Power Act[1] and seeking Court enforcement of a Commission order, issued March 31, 1950 (R. 14–41), insofar as that order related to Arizona Edison Company, Inc.[2] The dismissal followed the

[1] 16 U. S. C. §§ 825m (a), 825m (b), and 825p. In lieu of printing as an appendix to this brief the numerous provisions of the Act, which we cite, we are lodging with the Clerk printed pamphlet copies of the Act, for more convenient reference.

[2] The Commission's order was entered in a consolidated proceeding and also related to Central Arizona Light and Power Company, which has undertaken to comply with the order insofar as it related to that Company.

granting of the Company's motion to dismiss (R. 78–80) and denial of the Commission's motion for summary judgment (R. 84–85), when the Commission elected to stand on the Complaint (R. 88).

The March 31, 1950, order which the Commission sought to have enforced is one in which the Commission concluded from the facts found by it that the Company was subject to regulation as a "public utility" within the special meaning of that term as used in the Federal Power Act and directed it to comply with outstanding regulations generally applicable to every such "public utility" (R. 40).[3] It particularly directed compliance with the Commission's uniform accounting requirements and ordered certain specific accounting entries on the basis of its findings (R. 40–41). Those entries related to the Company's expenditures for certain utility facilities which had been sold to it April 1, 1948, by another "public utility" (California Electric Power Company) under a Commission authorization (R. 6, 16, 42, 50–54) which, with the Company's agreement, had reserved the questions of the Company's public utility status and method of accounting for its expenditures.

The District Court rendered no opinion and provided no explanation, written or oral, of any of its actions. Presumably, it agreed, at least in part, with the Company (R. 78–83) that the Commission had no statutory authority to issue an order establishing that an electric utility like the Company is subject to regulation under the Act as a "public utility," or to conduct a proceeding for determination of that question. This, notwithstanding that the question was one of coverage of the Act administered by the Commission and a technical question of the kind usually regarded as peculiarly suited to administrative determination in the first instance. For "public utility" status under the Act depended on whether the Company "owned or operated facilities" (other than "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce") for the "transmission of electric energy" which is "transmitted from a State [here Nevada and

[3] The order is in form similar to those which have frequently been reviewed and sustained by the courts. See *infra*, pp. 16–17.

California, respectively] and consumed at any point outside thereof [here, in Arizona]." [4]

The only specific ground in the Company's motion for its claim that the Commission was not authorized to determine the Company's "public utility" status, is a reference (R. 79) to the Commission's identification of the Company (R. 15) as follows:

> Arizona Edison is an Arizona corporation with its principal office in Phoenix, Arizona. It is engaged, solely in the State of Arizona, in the business of transmitting electric energy, and distributing and selling it at retail. * * *

Apparently the Company concludes from this that it is not a "public utility" and that the Commission does not have jurisdiction to reach a different conclusion.

The motion did not question the venue or jurisdiction of the District Court to enforce the order of the Commission, if the order was one within the Commssion's authority. Neither did it question that the violations alleged would entitle the Commission to Court enforcement, as prayed in the Complaint, if the order was within the Commission's authority. R. 78–83.

STATEMENT OF THE CASE

The facts are found in the allegations of the Complaint (R. 3–77) and supported by affidavit (R. 86–87). They are largely matters of record in the official records of the Commission. For the purposes of the motion to dismiss, the allegations are, of course, deemed to be admitted. For the purposes of the motion for summary judgment, there was no

[4] Insofar as here relevant, Section 201 (e) defines "public utility" as meaning "any person who owns or operates facilities subject to the jurisdiction of the Commission." Such facilities are described in Section 201 (b) as including facilities for "transmission of electric energy in interstate commerce" but not including (except as specifically so provided) "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce," among others. See *Jersey Central P. & L. Co.* v. *F. P. C.*, 319 U. S. 61; *Connecticut L. & P. Co.* v. *F. P. C.*, 324 U. S. 515; *cf.*, *F. P. C.* v. *East Ohio Gas Co.*, 338 U. S. 464. The statute further provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof" (Section 201 (c)).

genuine issue as to any of the facts alleged, the supporting affidavit being entirely uncontroverted.

In summary those facts are as follows.

The Commission Proceedings

The question of the Company's duty to comply with requirements of the Federal Power Act, and of regulations thereunder, which in terms apply to every "public utility," arose when the Commission had under consideration an application of another "public utility," California Electric Power Company, for authorization to transfer certain of its facilities to Appellee, Arizona Edison Company, Inc. (R. 5, 46).[5] To avoid delaying Commission approval of the transfer until Arizona Edison's "public utility" status under the Act could be determined, Arizona Edison had agreed to set up a special reserve assuring compliance with such conditions as the Commission might attach to the Company's acquisition of the facilities, if it should be established that the Company was a "public utility" (R. 5–6, 48–55).[6] Upon this undertaking, *inter alia*, the Commission had authorized the transaction (R. 6, 16–17, 50–54).

The Commission thereafter caused its staff to make a field investigation of the facilities and operations bearing on the status question (R. 6, 16). From the report of that investigation it appeared, according to the Commission, that the Company owned and operated "facilities in its Gila Bend, Maricopa, Coolidge-Florence, and Yuma Systems for the transmission of electric energy which is generated in the States of California and Nevada and consumed at points outside the State in which it is generated, including facilities which are in addition to, and do not include * * * facilities used in local

[5] The references in the text are to the Transcript of Record as printed. The cross references to Exhibits in the Complaint (R. 3–77) and Affidavit (R. 86–87), are to folio numbers of the Complaint, which were omitted from the printed Transcript of Record. The pages of the printed Transcript of Record at which the respective lettered Exhibits to the Complaint appear are shown in the Index, pp. i–ii, of the printed Transcript of Record.

[6] Arizona Edison proposed to pay almost $500,000 more for the facilities than the seller had invested in them on its books. This raised a question as to the effect on rate payers' interests of the acquisition at such a price, unless conditioned to prevent the transaction from increasing the rate base upon which rates would be expected to provide a fair return. *Cf., Pennsylvania Electric Co.* v. *F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

distribution, or only for the transmission of electric energy in intrastate commerce" and that the Company might "therefore, be a public utility within the meaning of that term as used in the Federal Power Act" (R. 43–44).

The Commission thereupon initiated a formal proceeding to determine the Company's status, to determine its resulting liability to comply with regulations applicable to every such "public utility," and to ascertain the accounting treatment it should accord its expenditures for the California Electric Power Company's facilities (R. 4, 6, 16). The order initiating the proceeding[7] not only recited the foregoing facts, tentatively framed the issues, and provided that the Company should file a response, but also directed service of a copy of the staff report on the Company (R. 42–45).[8] The order and copy of the report were mailed to, and actually received by, the Company (R. 6–7, 10–11, 17, 67, 68).

The Company advised the Commission that it would neither respond nor appear (R. 7, 17, 57). Nevertheless, it was given actual notice of each of the subsequent steps in the proceeding. First the Commission orders fixing time and place of hearing were mailed to, and actually received by, the Company (R. 7, 10–11, 58, 60). After the hearing, which the Company did not attend (R. 7, 15, 18), the Presiding Examiner's decision was mailed to, and actually received by, the Company (R. 8, 10–11, 73–75). Exceptions thereto by counsel for the Commission's staff were served on counsel for the

[7] The order was headed: "Order to Show Cause," conformably to the applicable provision of the Commission's rules (18 C. F. R. § 1.6 (d)): "*Orders to show cause:* Whenever the Commission desires to institute a proceeding against any person under statutory or other authority, the Commission may commence such action by an order to show cause setting forth the grounds for such action. Said order will contain a statement of the particulars and matters concerning which the Commission is inquiring, which shall be deemed to be tentative and for the purpose of framing issues for consideration and decision by the Commission in the proceeding, and the order will require that the respondent named respond orally, or in writing (as provided in § 1.9 (c)) [18 C. F. R. § 1.9 (c)], or both."

[8] The show cause order in this proceeding followed the pattern of those in other proceedings in which the Commission's orders have been sustained. The citations below permit comparison of the orders (*infra*, p. 16, note 18; p. 17, notes 24, 26, 27).

Company as they would have been if he had appeared and participated (R. 8, 10–11, 15; see 18 C. F. R. § 1.31).

The Commission Order

On March 31, 1950, the Commission issued its order (R. 31–41) incorporating Opinion No. 190 and including formal findings (R. 8, 14–41).[9] This, also, was mailed to, and actually received by, the Company (R. 10–11, 76–77).

In the opinion part of its order the Commission describes (R. 19–23) the specific facilities by which electric energy is transmitted from Nevada and California into Arizona, delivered to Arizona Edison, and transmitted thence by that Company for varying distances to substations from which it locally distributes the energy to retail customers in Arizona. In particular the opinion describes how, in the operation of the various interconnected public and privately owned electric utilities in Arizona and nearby parts of California and Nevada, with their respective hydroelectric and steam or diesel generating stations, under varying river flow and utility load conditions, varying amounts of the electric energy generated at Hoover Dam in Nevada are transmitted to Parker Dam in California, and varying amounts of energy generated at one or both dams are transmitted thence from California into Arizona and in part delivered to Arizona Edison at two substations owned and operated by the Indian Service in Arizona: (1) the Casa Grande substation and (2) the Coolidge substation. The opinion also describes how varying amounts of the energy generated at the Siphon Drop station in California, as well as at Hoover and Parker Dams, are transmitted from California into Arizona and delivered in part to Arizona Edison at two delivery points in Arizona: (1) Arizona Edison Company's Mesa substation, and (2) Reclamation Bureau Headquarters substation in Yuma.

The opinion describes the lines and substations, owned and operated by Arizona Edison, by which the electric energy so

[9] Because of the consolidated nature of the proceeding (See *supra*, p. 1, note 2) the Order also relates to Central Arizona Light and Power Company, but the portions relating to the present Appellee are readily recognizable.

delivered to it is transmitted from the foregoing substation delivery points without subdivision to other substations on its systems. Those lines, according to the opinion, include a 69,000 volt line 9.6 miles long, a 12,000 volt line, 11.5 miles long, a 34,500 volt line 12 miles long extending to a substation in one city, thence 7 miles farther to a substation in an unincorporated small community. The opinion refers to the fact that no customers are served off these lines, which are used exclusively to transmit energy in bulk at relatively high voltages to substations from which radiate customer-serving lines of relatively low voltage (usually 4,000 volts). In some instances, the opinion indicates, such customer-serving lines are undercarried back on the same pole lines carrying the higher voltage line supplying the substation, or forward on the pole lines carrying the continuation of that line to another similar substation beyond.

Citing *F. P. C.* v. *East Ohio Gas Co.* (338 U. S. 464) and *Jersey Central P. & L. Co.* v. *F. P. C.* (319 U. S. 61), the Commission first finds that the foregoing facilities, among others, are "facilities for the transmission of electric energy in interstate commerce"; then that those facilities are not "used in local distribution or only for the transmission of electric energy in intrastate commerce," and are not otherwise within any of the classes of facilities excepted from Commission jurisdiction by the so-called " 'but' clause" of Section 201 (b) of the Act.[10] R. 26–27.

The Commission also points out that ownership by the Federal Government of generating and transmission facilities prior to the points of delivery to Arizona Edison is of no consequence under the Act's special definition (Section 201 (b)) of transmission in interstate commerce in purely physical terms, i. e., as including transmission of energy transmitted from a State and consumed at a point outside thereof (R. 28).

The Commission accordingly concludes that Arizona Edison is a "public utility" and its formal findings numbered (1), and (3)–(14) (R. 31–35), embody the results of its consideration as discussed in its Opinion.

The ordering clauses direct the Company to comply with applicable requirements of the Act and the rules and regula-

[10] See *supra*, p. 3, note 4.

tions thereunder; to comply with outstanding accounting requirements prescribed by the Commission for public utilities generally, and, with respect to the question reserved by the stipulation in the merger proceeding, to charge to Earned Surplus a prescribed part (not less than $487,872.52) of the price paid for the facilities purchased from California Electric Power Company (R. 9–10, 40–41).

The Company's Failure to Seek Rehearing or Court Review

The Company did not make the application for Commission rehearing which is prerequisite to court review (Section 313 (a)) and did not apply to any United States Court of Appeals for review under Section 313 (b) of the Act (R. 10, par. 15). The time limits fixed by the statute for such applications had expired before the complaint was filed.

The Company's Violation of the Order

The Commission's order directed filing of certain accounting studies within 90 days (R. 40–41), and journal entries showing that the $487,872.52 charge had been made to Earned Surplus, within 30 days (R. 41, par. (D)). The Company failed and refused to comply, and continues to do so, despite repeated requests for compliance (R. 12, 62–66).

Venue was laid in the United States District Court, District of Arizona, under Section 317 of the Act, the Company being an inhabitant of the State and District of Arizona (R. 4, par. 4).

SPECIFICATION OF ERRORS

Because the District Court did not render an opinion or offer any explanation of its actions, it is possible only to specify errors in terms of the Court's actions. The District Court erred:

(1) In granting the Company's motion to dismiss (R. 87).

(2) In denying the Commission's motion for summary judgment (R. 87).

(3) In rendering judgment that the complaint and proceeding be dismissed with prejudice (R. 89).

SUMMARY OF ARGUMENT

I

A. The Commission's authority to issue this kind of order, determining whether a particular electric utility is a "public utility" and, if it is, requiring it to comply with outstanding Commission regulations, is clear from the provisions of the Act. Provisions authorizing the Commission to ascertain violations of the Act and "issue * * * orders * * * necessary or appropriate to carry out the provisions" of the Act are ample to confer such authority where "public utility" status is the key issue in establishing whether there is violation. Sections 307–309; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 210, note 47. So, too, the provisions regulating transfers of electric utility facilities, and accounting by "public utilities" (Sections 203, 301), fully authorize an order like the one here sought to be enforced. For the cases are clear that such a grant of power includes power to determine the coverage of the regulation. *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, 544; *Sunshine Anthracite Coal Co.* v. *National B. Coal Comm'n,* 105 F. 2d 559, 562–563 (C. A. 8); *Pownall* v. *United States,* 159 F. 2d 73 (C. A. 9), *affirmed,* 334 U. S. 742; *Piuma* v. *United States,* 126 F. 2d 601 (C. A. 9).

B. Numerous decisions consistently upholding the Commission's power to issue this exact kind of order make the sufficiency of that power indisputably clear. *F. P. C.* v. *East Ohio Gas Co.,* 338 U. S. 464; *Jersey Central P. & L. Co.* v. *F. P. C.,* 319 U. S. 61; *Hartford Electric Co.* v. *F. P. C.,* 131 F. 2d 953 (C. A. 2), *certiorari denied* 319 U. S. 741; *Pennsylvania W. & P. Co.* v. *F. P. C.,* 123 F. 2d 155 (C. A. D. C.), *certiorari denied* 315 U. S. 806; *Connecticut L. & P. Co.* v. *F. P. C.,* 324 U. S. 515; *Border Pipe Line Co.* v. *F. P. C.,* 171 F. 2d 149 (C. A. D. C.); *Arkansas P. & L. Co.* v. *F. P. C.,* 185 F. 2d 751 (C. A. D. C.), *certiorari denied,* 341 U. S. 909; *F. P. C.* v. *Arkansas P. & L. Co.,* 330 U. S. 802, *reversing per curiam,* 156 F. 2d 821 (C. A. D. C.) *which had reversed* 60 F.

Supp. 907 (D. C. D. C.); *Interstate Natural Gas Co.* v. *F. P. C.*, 331 U. S. 682; *Safe Harbor W. P. Co.* v. *F. P. C.*, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania W. & P. Co.* v. *F. P. C.* (C. A. D. C.), decided July 3, 1951.

C. The Company's claim that it could deprive the Commission of that power by staying away from the Commission's proceeding has no support in any statutory condition to the Commission's authority, and is contrary to the "primary jurisdiction" rule. In case after case that rule has been applied to prevent efforts to invoke court jurisdiction without first exhausting administrative remedies. *United States* v. *Sing Tuck*, 194 U. S. 161; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139–140; *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142–143; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 400; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 210–214; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543–544; and cases cited below refusing collateral judicial reexamination of questions administratively determinable subject to statutory court review. That rule is specifically applicable to the Commission. *F. P. C.* v. *Arkansas P. & L. Co.*, 330 U. S. 802, *reversing per curiam* 156 F. 2d 821 (C. A. D. C.) *which had reversed* 60 F. Supp. 907 (D. C. D. C.).

II

A. The Court of Appeals review of Commission orders provided by Section 313 is exclusive. *F. P. C.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159, *affirming* 98 F. 2d 835 (C. A. 9); *Safe Harbor W. P. Corp.* v. *F. P. C.*, 124 F. 2d 800 (C. A. 3), *certiorari denied*, 316 U. S. 663.

B. The numerous decisions of this and other courts are consistent in refusing collateral judicial reexamination of questions determined by an administrative agency where such questions were reviewable under an exclusive provision for review, whether they relate to the merits of the order (*Woods* v. *Kaye*, 175 F. 2d 886 (C. A. 9); *Miles Laboratories* v. *F. T. C.*, 140 F. 2d 683, 684 (C. A. D. C.), *certiorari denied*, 322 U. S. 752), con-

stitutionality (*Yakus* v. *United States*, 321 U. S. 414; *United States* v. *Ruzicka*, 329 U. S. 287; *LaVerne Coop. Citrus Assn.* v. *United States*, 143 F. 2d 415 (C. A. 9)), or coverage of the Act (*Lichter* v. *United States*, 334 U. S. 742, *affirming Pownall* v. *United States*, 159 F. 2d 73 (C. A. 9); *Piuma* v. *United States*, 126 F. 2d 601 (C. A. 9)). All of the cases known to be relied upon by the Company in this connection are cases in which there was no direct judicial review provided by statute excluding collateral review in enforcement proceedings. *Jeager* v. *Simrany*, 180 F. 2d 650, 653; *F. T. C.* v. *Claire Furnace Co.*, 274 U. S. 160; *N. L. R. B.* v. *Cheney Lbr. Co.*, 327 U. S. 385; *F. P. C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 172 F. 2d 57; *East Ohio Gas Co.* v. *F. P. C.*, 115 F. 2d 385 (C. A. 6); *F. P. C.* v. *Metropolitan Edison Co.*, 304 U. S. 375; *United Gas Pipe Line Co.* v. *F. P. C.*, 181 F. 2d 796 (C. A. D. C.).

ARGUMENT

I

THE COMMISSION'S ORDER WAS WITHIN ITS AUTHORITY

A. The Terms of the Statute Plainly Authorize Such an Order

In providing a comprehensive scheme of regulation for the part[11] of the privately owned electric utility industry which it found needed federal regulation, Congress left a difficult task of determining whether particular electric utilities are, or are not, subject to that regulation. For Congress adopted a limited, special meaning for the term "public utility," and framed almost all of the Act's regulations (other than those for the licensing of hydroelectric projects) to pertain solely to such "public utilities."[12] As originally drafted, the bill which

[11] That Congress was regulating only part of the industry is expressly stated in the declaration of policy in Section 201 (a).

[12] Thus, except in emergencies, only a "public utility" may be compelled by the Commission to interconnect, or sell or exchange energy, under Section 202 (b); only a "public utility" need secure Commission approval of its disposition or merger of facilities, or acquisition of securities under Section 203 (a), and only as to acquisition of the securities of another "public utility"; only "public utilities" need secure Commission approval of security issues under Section 204; the specified rates of "public utilities," only, are regulated and required to be filed under Sections 205 and 206; and service of

later became the Federal Power Act would have regulated every electric utility whose facilities crossed, or interconnected with facilities crossing, state boundaries,[13] but the definition of "public utility" finally adopted (*supra*, p. 3, n. 4) was more technical. It required, *inter alia*, in the case of an electric utility like Arizona Edison, determination of whether the energy transmitted on its facilities is actually in course of interstate movement, irrespective of intervening changes in custody or title, and irrespective of whether the company has control of the course of the energy beyond its facilities. *Jersey Central P. & L. Co.* v. *F. P. C.*, 319 U. S. 61, 68–73.

Determination of that question by the Commission was authorized where necessary or appropriate to the enforcement or administration of the Act both by general provisions relating to violations and by specific regulatory provisions.

Sections 307–309 confer upon the Commission broad powers to ascertain the facts with respect to violations and threatened violations generally, and to issue orders "necessary or appropriate to carry out the provisions" of the Act, fully warranting the kind of Commission order here sought to be enforced. Thus where, without complying with Commission regulation, an electric utility which may be a "public utility" engages in transactions or operations that are subject to that regulation if it is in fact a "public utility," Sections 307–309 clearly authorize the Commission to investigate the Company's "public utility" status. For the Commission's statutory authority to investigate "to determine whether any person has violated or is about to violate any provision of this Act or any rule, regula-

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"public utilities" only is regulated under Section 207; accounting regulation applies to "public utilities" under Sections 301 and 302; and regulation under Section 305 of the declaration of dividends out of capital, participation by officers and directors in benefits from issues of securities, and the holding of interlocking positions by officers and directors, is limited to officers and directors of "public utilities."

Among the significantly few exceptions are provision for Commission regulation of exportation of electric energy from the country ("no person shall transmit") under Section 202 (e); authority to compel "parties" to make temporary interconnections during national emergency under Section 202 (c); and authority to collect industry-wide information as a basis for recommending legislation, under Section 311.

[13] S. 1725, 74th Cong., 1st Sess.; see *Jersey Central P. & L. Co.* v. *F. P. C.*, 319 U. S. 61, 72, note 11.

tion, or order thereunder" (Section 307 (a)) plainly includes authority to investigate the company's "public utility" status, when that is the key question in determining whether a violation is involved.

As the Supreme Court said in *Oklahoma Press Pub. Co.* v. *Walling* (327 U. S. 186, 210, note 47):

> * * * Of course violations could be found only in situations where coverage would exist. Authority to investigate the existence of violations accordingly included authority to investigate coverage.

Equally applicable to the determination of "public utility" status, for the same reason, are the further provisions for taking evidence, subpenaing witnesses and records (Section 307 (b)), obtaining enforcement of subpenas (Section 307 (c)), taking depositions (Sections 307 (d)–307 (f)), waiving constitutional immunity against being required to give incriminating testimony (Section 307 (g)), holding hearings and admitting interested persons as parties to its proceedings (Section 308 (a)), and adopting rules of practice and procedure governing investigations, hearings and proceedings, as well as the statutory provisions expressly freeing the Commission from technical rules of evidence and procedural formalities (Section 308 (b)).

Where such investigation and proceeding disclose that the company is a "public utility" and that there is a continuing or threatened violation, determination and establishment of "public utility" status and direction of obedience to outstanding regulations applicable to every "public utility," as provided in the Commission order under consideration here, are obviously within the plenary terms of Section 309:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. * * *

Cf., Rochester Tel. Corp. v. *United States,* 307 U. S. 125, 127.

In addition to the foregoing general powers with respect to violations, specific regulatory provisions of the Act carry independent authority for Commission determination of the "pub-

lic utility" status question. This is illustrated by the very sections involved here which clearly authorize the issuance of this kind of order.

As the Commission's Opinion made plain (R. 15–17), its proceeding grew out of the application of California Electric Power Company for authority to sell certain of its facilities to Arizona Edison. If Arizona Edison were a "public utility" its acquisition of those facilities at the price proposed would raise an issue as to the accounting conditions which the Commission should impose.[14] Therefore, whether that issue had to be decided and what, if any, action should be taken on it depended in the first place on a determination of whether Arizona Edison was a "public utility." As a result of that Company's stipulation that it would set up a $500,000 reserve, the Commission was able to approve the sale of facilities and reserve the public utility status question and the accounting issue for further proceedings and subsequent order (*supra*, p. 4). Such reservation was authorized by the Act, for Section 203 (b) expressly provides:

> * * * The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

Furthermore, because such further order would relate to accounting it would also fall within the Commission's powers under Section 301 to regulate accounting of "public utilities." [15] That Section provides:

> * * * The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend

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[14] Compare *Pennsylvania Electric Company*, F. P. C. Opinion No. 194, issued June 1, 1950, *affirmed*, *Pennsylvania Electric Company* v. *F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

[15] *Pennsylvania Electric Company* v. *F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

> a charge or credit pending submission of satisfactory proof in support thereof.[16]

Inasmuch as the Commission's powers under both Sections 203 and 301 depended on the "public utility" status of Arizona Edison, those sections necessarily authorized the Commission, by the notice and hearing procedures specifically authorized in those sections, to determine that status and act accordingly. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544; *Sunshine Anthracite Coal Co.* v. *National B. Coal Comm'n.*, 105 F. 2d 559, 562–563 (C. A. 8); *Pownall* v. *United States*, 159 F. 2d 73 (C. A. 9), *affirmed*, 334 U. S. 742; *Piuma* v. *United States*, 126 F. 2d 601 (C. A. 9).

In the *Macauley* case, the statutory grant of power to renegotiate contracts entered into with the Maritime Commission was held to authorize, by necessary implication, Board determination of the jurisdictional question of whether it had power to renegotiate contracts signed with the British Ministry of War Transport (327 U. S. at p. 544):

> For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits.

In the *Sunshine Anthracite Coal Co.* case that Commission's authority to determine whether a particular coal company was a producer of bituminous coal was upheld on the basis of the inherent necessity of that determination to the discharge of the Commission's statutory function to fix coal prices on the basis of the weighted average cost "of the ascertainable tonnage" of the bituminous coal produced in each District. The Court there said (105 F. 2d 559, 563):

> There is ample precedent for administrative bodies determining their own jurisdiction at the commencement

[16] Commission accounting orders under Section 301 have been consistently affirmed. *Northwestern E. Co.* v. *F. P. C.*, 321 U. S. 119; *Pacific P. & L. Co.* v. *F. P. C.*, 141 F. 2d 602 (C. A. 9); *California Oregon P. Co.* v. *F. P. C.*, 150 F. 2d 25 (C. A. 9), *certiorari denied*, 326 U. S. 781; *Arkansas P. & L. Co.* v. *F. P. C.*, 185 F. 2d 751 (C. A. D. C.), *certiorari denied*, 341 U. S. 909; *Pennsylvania Electric Co.* v. *F. P. C.*, 188 F. 2d 763 (C. A. 3), *rehearing denied* May 28, 1951.

of the investigation of a question, subject, of course, to appropriate judicial review.

The *Pownall* and *Piuma* cases, *supra,* decided by this Court, are discussed under Point II (*infra,* pp. 24–26) in showing that such determinations by an administrative agency will not be reexamined by the courts in enforcement proceedings.

B. The Numerous Court Decisions on Review of Similar Commission Orders Confirm the Commission's Authority

The Commission's authority to issue the kind of order here sought to be enforced is confirmed by numerous Supreme Court and Courts of Appeals' decisions repeatedly affirming exactly similar orders "carrying direction of obedience to previously formulated mandatory orders addressed generally to [public utilities] amenable to the Commission's authority."[17] They each followed a determination that a particular electric utility was a "public utility," or that a particular hydroelectric project was subject to the Commission's licensing jurisdiction under Section 4 (e) of the Act, or that a particular gas company was a "natural gas company" under corresponding provisions of the Natural Gas Act (which is also administered by the Commission). *F. P. C.* v. *East Ohio Gas Co.,* 338 U. S. 464;[18] *Jersey Central P. & L. Co.* v. *F. P. C.,* 319 U. S. 61;[19] *Hartford Electric Co.* v. *F. P. C.,* 131 F. 2d 953 (C. A. 2), *certiorari denied,* 319 U. S. 741;[20] *Pennsylvania W. & P. Co.* v. *F. P. C.,* 123 F. 2d 155 (C. A. D. C.), *certiorari denied* 315 U. S. 806.[21] The Commission's orders in those cases are cited in the footnotes to permit comparison with the form of order involved here. In addition the "show cause" orders initiating the respective proceedings are referred to for the same purpose, where they are available in the F. P. C. reports. Not only were the final orders in those proceedings sustained, but even in the other cases in which similar Commission orders were

[17] *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 144.

[18] *Affirming* 6. F. P. C. 176, 5 F. P. C. 596; see 3 F. P. C. 917.

[19] *Affirming* 2 F. P. C. 541.

[20] *Affirming* 2 F. P. C. 359, 2 F. P. C. 502, 37 P. U. R. (N. S.) 193, 44 P. U. R. (N. S.) 515.

[21] *Affirming* 2 F. P. C. 61, 31 P. U. R. (N. S.) 1.

not sustained, the Commission's jurisdiction to issue the order was nevertheless recognized. *Connecticut L. & P. Co.* v. *F. P. C.*, 324 U. S. 515; [22] *Border Pipe Line Co.* v. *F. P. C.*, 171 F. 2d 149 (C. A. D. C.).[23] Furthermore, in the *Connecticut L. & P.* case, although the Commission's order was not sustained, the Supreme Court ordered a remand to the Commission for determination of the question of "public utility" status in accordance with its interpretation of the statute, thus necessarily holding that the Commission had authority to determine that question.

In addition to the foregoing cases in which the Commission acted under its general powers with respect to violations, the Commission's authority to determine "public utility" status in the discharge of a specific regulatory function has been uniformly sustained in numerous other cases. *Arkansas P. & L. Co.* v. *F. P. C.*, 185 F. 2d 751 (C. A. D. C.), *certiorari denied* 341 U. S. 909; [24] *F. P. C.* v. *Arkansas P. & L. Co.*, 330 U. S. 802, *reversing* 156 F. 2d 821 (C. A. D. C.), *which had reversed* 60 F. Supp. 907 (D. C. D. C.); *Interstate Natural Gas Co.* v. *F. P. C.*, 331 U. S. 682; [25] *Safe Harbor W. P. Co.* v. *F. P. C.*, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; [26] *Pennsylvania W. & P. Co.* v. *F. P. C.*, (C. A. D. C.), decided July 3, 1951.[27]

C. The Commission's Authority Was Not Dependent Upon the Company's Appearance or Participation in the Commission Proceeding

In the face of the clear terms of the statute and this unusually impressive body of cases upholding the Commission's authority to issue such orders as the one here sought to be enforced, it will not suffice for the Company to claim, as it did, in effect, in oral argument in the District Court, that it could deprive the Commission of such authority by its nonappearance and nonparticipation in the Commission proceeding. That contention was not that the Company had not been accorded

[22] *Setting aside* 3 F. P. C. 132, 44 P. U. R. (N. S.) 170; see 2 F. P. C. 853.
[23] *Setting aside* 6 F. P. C. 411.
[24] *Affirming* 8 F. P. C. 106, 80 P. U. R. (N. S.) 193; see 3 F. P. C. 1018, 4 F. P. C. 728.
[25] *Affirming* 3 F P. C. 416.
[26] *Affirming* 5 F. P. C. 221; see 4 F. P. C. 696.
[27] *Affirming* 8 F. P. C. 1, 170, 82 P. U. R. (N. S.) 193, 286; see 4 F. P. C. 697.

the notice and opportunity to be heard to which it is entitled under the Constitution, the Administrative Procedure Act (5 U. S. C. § 1001, *et seq.*), the Federal Power Act, or the Commission's rules. Rather the contention was phrased in terms which sought to condition the Commission's authority by importing conceptions developed in court procedures: "* * * the Plaintiff Commission lacked and now lacks *jurisdiction over the person* of Defendant, Arizona Edison Company, Inc. * * *" (R. 79, par. IV. [Emphasis supplied.])

The statute does not so condition its grants of that authority, while the "primary jurisdiction" rule also bars such a claim.

While it is true that in the cases discussed above the parties involved had, in fact, appeared and participated in the Commission proceedings, the results reached in no case depended on that fact. That they were not so dependent is shown also by the fact that those decisions were merely specific applications of the "primary jurisdiction" rule. That rule prevents resort to the courts as an alternative to administrative determination of questions committed to such agencies by Congress. The rule has to a large extent actually been developed by cases in which the parties made every effort they could, without risking sacrifice of their claims, to avoid appearing and participating in the administrative agency's proceeding. It is, therefore, peculiarly applicable to Appellee's claim.

That rule has been called the keystone of the arch of administrative regulation.[28] It requires that where an administrative body is given jurisdiction, its jurisdiction must be exhausted before that of the courts may be invoked.[29]

The principle was clearly enunciated by the Supreme Court as far back as 1904, in *United States* v. *Sing Tuck,* 194 U. S. 161, a *habeas corpus* proceeding involving the power of an immigration inspector to determine whether certain persons were aliens and therefore not entitled to entry into the United States. The Court through Mr. Justice Holmes there said (194 U. S. at pages 167–168):

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[28] Note, 51 Harv. L. R. 1251 (1938).

[29] See Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981, 992, *et seq.* (1939).

> [The act] points out a mode of procedure which must be followed before there can be resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. * * *
>
> We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.

The Court then sums up the principle of primary jurisdiction in the administrative body by saying (194 U. S. at page 170), "* * * before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with."

That doctrine time and again has been reaffirmed by the Supreme Court in such landmark cases as *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.* (204 U. S. 426); *Myers* v. *Bethlehem Corp.* (303 U. S. 41); *Rochester Tel. Corp.* v. *United States* (307 U. S. 125, 139–140); *F. C. C.* v. *Pottsville Broadcasting Co.* (309 U. S. 134, 142–143); *Sunshine Coal Co.* v. *Adkins* (310 U. S. 381, 400); *Oklahoma Press Pub. Co.* v. *Walling* (327 U. S. 186, 210–214); and *Macauley* v. *Waterman S. S. Corp.* (327 U. S. 540, 543–544).

In the *Myers* case, *supra,* to mention but one of these oft-cited cases, contentions were advanced similar to those urged by the Company in the Court below. In that case the shipbuilding company sought to enjoin the initiation of a proceeding against it by the National Labor Relations Board alleging that it was not engaged in interstate or foreign commerce within the meaning of the act administered by the Board and that the Board did not have jurisdiction over the subject matter. The Supreme Court reversed the decrees for preliminary injunction

granted by the District Court and Court of Appeals, saying (303 U. S. at p. 50):

> The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. *So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance.* [Emphasis supplied.]

That the "primary jurisdiction" rule applies specifically to the Federal Power Commission's authority to determine whether an electric utility is subject to its regulation or to that of a State commission, as the company here argued in its motion to dismiss (R. 79), has been settled by the Supreme Court. *F. P. C.* v. *Arkansas P. & L. Co.*, 330 U. S. 802, *reversing per curiam* 156 F. 2d 821 (C. A. D. C.), *which had reversed* 60 F. Supp. 907 (D. C. D. C.). There, in an opinion announced with emphatic promptitude on the fifth day after oral argument, the unanimous Court tersely rested its decision in favor of the Commission on the "ground that respondent has failed to exhaust its administrative remedies," citing *Myers* v. *Bethlehem Corp., supra,* and *Macauley* v. *Waterman S. S. Corp., supra.*[30]

One other case holding that the primary jurisdiction of an administrative agency to determine the coverage of its Act cannot be defeated by the party's desire to avoid appearing and participating in the administrative proceeding on that question, may be mentioned before we turn to consider under the

[30] The Supreme Court has become increasingly peremptory in its rejection of efforts to create exceptions to the "primary jurisdiction" rule. Thus in *S. E. C.* v. *Otis & Co.* (338 U. S. 843) the Supreme Court reversed a decision of the Court of Appeals for the District of Columbia undertaking to decide a question which was pending before the S. E. C. (176 F. 2d 34) by per curiam decision on the petition for certiorari, without waiting for briefs on the merits and oral argument.

next point the cases which could also be cited here, refusing to reexamine coverage questions in enforcement proceedings. In *Sunshine Coal Co.* v. *Adkins* (310 U. S. 381, 383), the coal company argued that if the Bituminous Coal Act of 1937 were construed as delegating power to the coal commission to determine the coverage of the Act, it would be invalid as an unconstitutional delegation of the judicial function of construction of the Act. The Supreme Court disposed of that contention, saying (310 U. S. at p. 400):

> Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act.

II

THE COMMISSION'S ORDER MAY NOT BE REEXAMINED IN A DISTRICT COURT PROCEEDING FOR ITS ENFORCEMENT

The terms of the statute and the court decisions are both clear that the Commission's order may not be reexamined in a district court proceeding for its enforcement.

A. The Statutory Provision for Court of Appeals Review Is Exclusive

Section 313 of the Act provides for review of Commission orders by Courts of Appeals. That provision has been held to formulate the conditions under which lower courts may be resorted to, to exclude review by district courts, and even to repeal by implication the earlier provision of Section 20 for district court review in the manner specified in the Urgent Deficiencies Act (28 U. S. C. §§ 41 (Subd. 28) 43–48). *F. P. C.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159, *affirming* 98 F. 2d 835

(C. A. 9); *Safe Harbor W. P. Corp.* v. *F. P. C.*, 124 F. 2d 800 (C. A. 3), *certiorari denied*, 316 U. S. 663.

In the *Pacific P. & L. Co.* case the Supreme Court, upholding this Court's denial of a motion to dismiss a petition for review of a Commission order, said (307 U. S. at page 159):

> * * * [T]he Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower Federal courts.

A similar conclusion was reached in the *Safe Harbor* case. There the Third Circuit had before it simultaneously a petition for review of a Commission order under Section 313 (b), and an appeal from a district court dismissal of an action for injunction against the same order, as specified in the Urgent Deficiencies Act, *supra*, pursuant to Section 20 of the Power Act. Section 20 was enacted in 1920 while Section 313 (b) was added in 1935 without any express repeal of Section 20. The Third Circuit held that the Court of Appeals review under Section 313 (b) was exclusive and superseded District Court review under Section 20 (124 F. 2d at p. 804):

> * * * [S]ince Section 313 (b) does provide a new and specific and complete remedy fully covering the subject matter, we conclude that the review given by the section just cited is "exclusive" and that the review provisions of Section 20 must be deemed to have been repealed by implication.

The exclusiveness of the Section 313 (b) provision for Court of Appeals review is further shown, not alone by its express provision that the Court of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside" the Commission's order when the transcript of record has been filed in the Court, but by numerous restrictive conditions with which the statute limits the opportunity for review.

Thus Section 313 (b) provides in part:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for the failure

> so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

Section 313 (a) adds a further restriction:

> No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

Both sections also impose rigid time limits, 30 days for filing application for rehearing, 60 days for petition for review.

These restrictive provisions manifest a clear Congressional purpose to provide maximum opportunity for Commission consideration and reconsideration of all evidence and contentions before court review, to give to Commission decisions the maximum finality compatible with Constitutional safeguards, to require promptness in seeking judicial review, and to provide for that review by courts accustomed to exercising appellate jurisdiction—each a bar to the Company's present attempt.

B. The Court Decisions Consistently Deny Reexamination

That the questions determined in an order of this kind will not be collaterally reexamined in enforcement proceedings where there is such an exclusive statutory provision for direct ~~exclusive~~ judicial review has been made abundantly plain by court decisions involving efforts to obtain court reexamination not only of questions as to the merits of the order (*Woods* v. *Kaye,* 175 F. 2d 886 (C. A. 9); *Miles Laboratories* v. *F. T. C.,* 140 F. 2d 683, 684 (C. A. D. C.), *certiorari denied,* 322 U. S. 752), but of constitutional questions (*Yakus* v. *United States,* 321 U. S. 414; *United States* v. *Ruzicka,* 329 U. S. 287; *LaVerne Coop. Citrus Assn.* v. *United States,* 143 F. 2d 415 (C. A. 9)), and of questions of the administrative agency's jurisdiction—the precise question involved here (*Lichter* v. *United States,* 334 U. S. 742, *affirming Pownall* v. *United States,* 159 F. 2d 73 (C. A. 9); *Piuma* v. *United States,* 126 F. 2d 601 (C. A. 9), *certiorari denied,* 317 U. S. 637).

In view of the full consideration this Court has given the matter we shall confine our discussion to brief references to its decisions.

Earliest of those was the *Piuma* case. That was a proceeding for violation of a Federal Trade Commission order to cease and desist from advertising certain claims for a nostrum called "Glendage." No petition to review the order in the method provided by the statute was ever filed. The F. T. C.'s complaint in the District Court merely alleged issuance of the order, and service on the defendant, attaching copies of the F. T. C.'s "complaint" (corresponding to the F. P. C.'s "order to show cause" here) and "report" (corresponding to the F. P. C.'s "opinion" here), which were admitted to be true copies.

This Court affirmed judgment for the F. T. C., saying (126 F. 2d at p. 603) that from the F. T. C. "complaint" and "report":

> [I]t appears that the Commission charged and found all facts essential to its jurisdiction. Its findings are not here open to review.

Next was the *LaVerne* case. There the United States sued to enjoin lemon growers' associations from violating an order, issued by the Secretary of Agriculture under the Agricultural Marketing Act of 1937, regulating the handling of lemons. The answers sought to raise questions as to the legality and constitutionality of the order, including the sufficiency of effect on interstate commerce, but evidence on those issues was excluded by the trial court on the ground there was an exclusive administrative remedy, including judicial review, by which those questions must be determined. This Court affirmed the District Court, saying (143 F. 2d at pp. 419, 420):

> A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action.
>
> * * * * *
>
> The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the

issue is raised by defending parties as where it is raised by moving parties.

The *Pownall* case was next to arise. That was an action by the United States to recover excess profits claimed by virtue of an order made by the Under Secretary of War under the authority of the Renegotiation Act. The contractors had not petitioned the Tax Court for a redetermination in the *de novo* proceeding which the Renegotiation Act provided, and their time for filing petition therefor had expired. In the District Court they alleged that the Renegotiation Act was unconstitutional and the order invalid because based on undisclosed data and containing no findings. This Court upheld recovery by the United States,[31] saying (159 F. 2d at p. 74):

> Appellants contend that the Under-Secretary of War and the Board [War Contracts Price Adjustment Board] have no authority under the Act to renegotiate the particular contracts here involved. They claim that since each of their subcontracts was for less than $100,000 the provisions of the Act as amended on February 25, 1944, do not cover them. They also contend that since each contract was completed prior to that amendment, they are not within its coverage. *Assuming, without deciding, that there is merit in these contentions, we are of the opinion that the district court was without jurisdiction to consider them.* [Emphasis supplied.]

On *certiorari* the Supreme Court affirmed this Court's decision *eo nomine Lichter* v. *United States* (334 U. S. 742, 792), saying that the statutory provision for redetermination of excessive profits was not:

> * * * an optional or alternative procedure. * * * Failure of the respective petitioners to exhaust that procedure has left them with no right to present here issues such as those as to coverage and the amount of profits which might have been presented there. * * * [F]or example, the contention in the *Pownall* case that petitioners' contracts which were for

[31] See also *Sampson Motors, Inc.*, v. *United States*, 168 F. 2d 878 (C. A. 9).

> amounts under $100,000 each were not subject to renegotiation.[32]

Lastly in *Woods* v. *Kaye* the Court held that in a suit by the Housing Expediter to compel restitution of rent overcharges in accordance with a rent reduction and refund order (175 F. 2d at pp. 888–889):

> In the enforcement procedure, little more than the validity of the statutory provisions * * * plus the fact of violation of the regulation or order may be inquired into.

This was rested on the existence of the statutory method of review (175 F. 2d at pp. 889–890):

> * * * the District Court does not have jurisdiction to inquire into that which could have and should have been appealed to the Emergency Court of Appeals.

The Court quotes language of Mr. Justice Rutledge in *Bowles* v. *Willingham*, (321 U. S. 503, 527):

> * * * Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived where she might well have expected, at the wrong end.

We believe that this Court's repeated decisions lead to the same conclusion with respect to Arizona Edison.

The only cases cited by the Company in the Court below to oppose this clear line of authority were all cases in which the statute did not provide another, exclusive method of judicial review. Of course, in such cases, where the terms of the statute make the enforcement proceeding itself a direct method for reviewing the administrative order, or where constitutional safeguards entitle a party to judicial review because none has theretofore been afforded him, an entirely different situation is presented from that by this order, which was reviewable

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[32] Company counsel's only answer to the *Lichter* case on oral argument below was that there the coverage question had been rightly decided by the administrative agency; wrongly here. But, of course, that is precisely what this Court and the Supreme Court said could not be inquired into.

under Section 313 (b). A brief statement with respect to each of those cases will suffice to show why it does not affect the principle that is controlling here.

The only decision of this Court so cited by the Company (R. 81) was *Jeager* v. *Simrany,* 180 F. 2d 650, 653. That was a suit for declaratory judgment and injunction against the Officer In Charge of the Immigration and Naturalization Service in Tucson from conducting a proceeding to cancel a record of registry and certificate of lawful entry. Two points are to be noted. The first, and the one principally considered in this Court's opinion, is "that there is a complete absence of power in the Commissioner to make the cancellations" (180 F. 2d 650, 651). That case was, therefore, not one where the administrative agency was authorized to determine whether a particular person came within the coverage of the Act, and had acted within that power, as is shown to be the case here by the numerous cases already cited affirming the Commission's power to issue such orders (*supra,* pp. 16–17). The administrative agency there completely lacked any power whatever with respect to cancellation of records of registry and certificates of lawful entry.

But it is perhaps even more important to observe that the statute there involved, the Nationality Act of 1940 (8 U. S. C. §§ 501–1006), contains no provision for judicial review. Hence only by some proceeding like that there under appeal, could judicial examination of the legal question involved be obtained.

F. T. C. v. *Claire Furnace Co.* (274 U. S. 160) was referred to by the Company in its memorandum in opposition to the Commission's motion for summary judgment (not part of the Record on Appeal). In that case the Supreme Court, although refusing injunction against the F. T. C., declared that enforcement of the F. T. C.'s order requiring coal, steel and other companies to file voluminous monthly reports on their businesses, could only be by proceedings instituted by the Attorney General for mandamus and that in such proceedings the defendants would be able to "answer and have full opportunity to contest the legality of any prejudicial proceedings against

them. That right being adequate, they were not in a position to ask relief by injunction."

But the Court's declaration that the validity of the administrative order could be reexamined in the proceedings instituted by the Attorney General needs to be read in the light of the fact that the particular kind of F. T. C. order there involved was not otherwise reviewable at all because there was no statutory provision for court review prior to such enforcement proceeding. As the opinion makes clear that order was issued under Sections 6 and 9 of the Federal Trade Commission Act (15 U. S. C. §§ 46, 49) and enforceable solely under Sections 9 and 10 (15 U. S. C. §§ 49, 50), whereas the usual F. T. C. cease and desist orders are issued and judicially reviewable on petition of an aggrieved party (as F. P. C. orders are) under Sections 2, 3, 7, 8 and 11 of the Clayton Act (15 U. S. C. §§ 13, 14, 18, 19, 21) and Section 5 of the Trade Commission Act (15 U. S. C. § 45). Reviewability in enforcement proceedings of such an order, otherwise not reviewable, is an entirely different matter from the present situation, covered by the cases previously discussed, where Congress has provided another and exclusive mode of court review.

Another Supreme Court case relied upon by the Company in oral argument in the District Court is *N. L. R. B.* v. *Cheney Lbr. Co.* (327 U. S. 385). In that proceeding, initiated in a Court of Appeals to enforce an N. L. R. B. order to cease and desist from unfair labor practices, the Supreme Court said (327 U. S. 388):

> Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce.

This dictum is similar to this Court's language, discussed above, in *Jeager* v. *Simrany* (*supra,* p. 27) and immaterial here, where the Commission's order is almost identically similar to numerous orders repeatedly held within its powers on court review, as we have shown (*supra,* pp. 16–17). But it is more important to bear in mind that the review provisions of the National Labor Relations Act differ in one important essential from those of the Federal Power Act. The N. L. R. A. provision

(29 U. S. C. § 160 (f)) that Board orders may be reviewed by Courts of Appeal on petition of an aggrieved party is not an exclusive method of review. For that statute also contains parallel provisions (29 U. S. C. § 160 (e)) for judicial review of Board orders on application by the Board to Courts of Appeal for enforcement. Thus while the *Cheney* case was an enforcement case, it was *by the terms of that statute* also a direct review proceeding, with explicit statutory provision for certification of the entire Board record to the Court. Such a provision is consistent only with a Congressional intention for judicial reexamination of judicially reviewable aspects of the order. *Cf., N. L. R. B.* v. *Red Spot Electric Co.* (C. A. 9, decided June 20, 1951). There is no corresponding provision in Sections 314 (a), 314 (b) and 317 of the Power Act under which the present enforcement proceeding is brought.

The resulting necessity for distinguishing proceedings for enforcement of N. L. R. B. orders from the present proceeding may be pointed up by noting an important difference between the orders involved. N. L. R. B. orders (like F. T. C. cease and desist orders) are without certain important legal sanctions until and unless implemented by a Court of Appeals enforcement order. F. P. C. orders, on the other hand, unless stayed,[33] must be obeyed when they become effective in accordance with the Commission's rules,[34] at peril of criminal penalties (Section 316), forfeitures (Section 317), and civil liabilities under some orders (such as orders fixing rates) (*Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246, 251).

Because of these differences, reviewability of N. L. R. B. orders in enforcement proceedings could not be deemed a precedent in enforcement of F. P. C. orders without introducing into the field of utility regulation a chaos and lack of uniformity as to what "the law" is, like that which led the Supreme Court long ago to establish the primary jurisdiction rule in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.* (204 U. S. 426, 439, 440–441).

[33] Section 313 (c) provides for Commission and Court issuance of stay orders.

[34] 18 C. F. R. § 1.13 (c).

Another Supreme Court case relied on by the Company (R. 81) was *F. P. C.* v. *Panhandle Eastern Pipe Line Co.* (337 U. S. 498) and the same case in the Court of Appeals for the Third Circuit (172 F. 2d 57). That was a suit by the Commission to enjoin a disposition of gas leasehold interests by a "natural gas company," and to maintain the *status quo*, pending the outcome of a Commission proceeding to determine whether such disposition would impair the ability of the "natural gas company" to serve the customers in its service area. The Commission had instituted an investigation, set a date for hearing, and issued a "show cause order," as specified in its rules.[35] In that order, however, it directed, *inter alia*, that the *status quo* be maintained. The suit was instituted in a District Court on the apparent refusal of Panhandle Eastern to comply. 337 U. S. 498, 501. The Supreme Court, holding that the transfer of the leasehold interests was part of "production and gathering" which the statute expressly excepts from the Commission's jurisdiction, upheld denial of the injunction.

But in citing that case the Company overlooked the fact that the Commission's order there, issued before hearing, in an attempt to delay what the Commission had not then determined was within its authority to prevent, was not the kind of order which is reviewable under Section 313 (b). For, as the Supreme Court said in *F. P. C.* v. *Metropolitan Edison Co.* (304 U. S. 375, 383–384), neither the language of that Section:

> nor that of § 313 (a), should be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.
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> * * * The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

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[35] See note 7, *infra*, p. 5.

The show cause order which the Commission sought to have enforced in the *Panhandle* case, not being reviewable until the proceedings should result at a later date in a reviewable order, confronted the Court with a far different problem than that presented here, where there already has been full opportunity for judicial review under Section 313 (b).

The same is true of *East Ohio Gas Co.* v. *F. P. C.* (115 F. 2d 385 (C. A. 6)) and *F. P. C.* v. *Metropolitan Edison Co.* (304 U. S. 375), also cited by the Company (R. 81), both of which involved procedural orders,[36] not reviewable under § 313 (b).

United States v. *Idaho* (298 U. S. 105), relied upon by the Company in oral argument below, was a proceeding against a railroad to enjoin an "unauthorized abandonment," brought under Section 1 (20) of the Interstate Commerce Act, and against the I. C. C. to annul its order, under the Urgent Deficiencies Act which is the direct and exclusive method of review provided by the Interstate Commerce Act. But here, Arizona Edison Co. elected not to follow the direct and exclusive method of review provided by Section 313 (b). Questions of coverage reexaminable on direct review, as that case holds, may not be collaterally reexamined in enforcement proceedings, as the later Supreme Court cases we have already discussed make plain.[37]

United Gas Pipe Line Co. v. *F. P. C.* (181 F. 2d 796 (C. A. D. C.)), the only remaining case cited in this connection by the Company below (R. 81), involved a general rule or regulation governing the filing of rate schedules, which the Court there held, on a petition for review, was not reviewable under Section 19 (b) of the Natural Gas Act (a review provision exactly corresponding to Section 313 (b) of the Federal Power Act), 181 F. 2d 796, 798 (C. A. D. C.).[38] Of course, the

[36] The *East Ohio Gas Co.* case involved a show cause order like that in this record (R. 42). The peculiar facts of the *Metropolitan Edison* case appear in the Court's opinion.

[37] *Hecht Co.* v. *Bowles* (321 U. S. 321), also relied on by the Company in oral argument below, may be noted in this connection. That was a proceeding to enforce an O. P. A. price regulation. The point there decided was merely that the District Court had discretion to consider whether an injunction or some "other order," as authorized in the statute, might be more appropriate to secure compliance.

[38] See *Woods* v. *Kaye*, 175 F. 2d 886, 889 (C. A. 9).

statutory method of review, being inapplicable, could not exclude other methods of review, as it does here.

CONCLUSION

The Commission had well established authority to issue the order, the Company was accorded abundant opportunity to participate in the proceedings which resulted in that order and to obtain Court of Appeals review thereof on the record made before the Commission, it has "let the hour go by" (*Utley* v. *St. Petersburg*, 292 U. S. 106, 110–111), it is deliberately violating requirements of that order, and it may not now, when its compliance is sought to be enforced by court process, obtain District Court reexamination of questions determined in that order. The Judgment of the District Court should be vacated, the Court orders granting the motion to dismiss and denying the motion for summary judgment should be reversed, and the cause remanded to the District Court with instructions to grant the relief prayed.

Respectfully submitted.

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